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No. 97-1868

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

UNUM LIFE INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

JOHN E. WARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. THE NOTICE-PREJUDICE RULE IS NOT A STATE LAW THAT REGULATES INSURANCE.

A. The Notice-Prejudice Rule Is, In Substance, The Particular Application To An Insurance Contract Of A Widely Recognized General Common Law Principle.

Respondent and the Solicitor General make much of the fact that the notice-prejudice rule has not been applied "by its terms," or "as such," in California cases that do not involve insurance policies. (Brief for Respondent ("Ward Br.") at 16; Brief for United States ("U.S. Br.") at 12). From this observation, they conclude that the notice-prejudice rule is "specifically directed at the insurance industry," and thus, from a common-sense viewpoint, regulates insurance. This line of reasoning rests upon an

unrealistic and superficial understanding of the common law.

A widely but not universally recognized principle of common law allows failures to satisfy contractual forfeiture provisions, such as conditions precedent, to be ignored as immaterial in appropriate circumstances. "To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange." *Restatement (Second) of Contracts*, § 229. Two months ago, the Tennessee Supreme Court expressly relied upon Restatement section 229 to support the adoption in Tennessee of the "notice-prejudice rule" in the context of deciding on a claim for insurance benefits. *Alcazar v. Haye*, 1998 Ten. LEXIS 749 (Dec. 1998) (For Publication). So, too, Connecticut ten years ago cited to section 229 in adopting the notice-prejudice rule. *Aetna Cas. and Sur. Co. v. Murphy*, 206 Conn. 409 (1988).

California courts apply the principle that a non-material breach might not cause a forfeiture in many situations. *E.g., Ruben v. Fuchs*, 1 Cal.3d 50, 54 (1969) (real estate contract not voided by buyer's failure to post funds by a certain date); *Sosin v. Richardson*, 210 Cal.App.2d 258, 264 (1962) (contract provision not construed as "condition precedent" unless plainly stated). *See Hopkins v. Woodward*, 216 Cal. 619 (1932) (equitable relief against forfeiture of contract to produce a play); *Henck v. Lake Hemet Water Co.*, 9 Cal.2d 136, 143 (1937) (water contract case; Cal. Civ. Code § 3275 provides relief from forfeiture of contract rights); *O'Morrow v. Borad*, 27 Cal.2d 794, 800-801 (1946) (insurance case observing that equitable relief against forfeiture applies broadly in both insurance and other contract cases); 1 Witkin, *Summary of Cal. Law* (9th ed. 1987), Contracts § 771 (discussing equitable relief agaist forfeitures and citing *Restatement (Second) of Contracts*, § 229).

Against this background, the issue fairly posed is whether application of section 229 concepts to a contract that is an insurance contract is a regulation "specifically directed to the insurance industry" or is, instead, an application of a common law principle whose roots "are firmly planted in the general principles of . . . contract law." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987).[1] Respondent and his supporting *amici* would have the answer to this question turn on mere labels. If the state court, like Tennessee's or Connecticut's, announces in an insurance contract case that it is applying Restatement section 229, then the application does not constitute a law regulating insurance. On the other hand, if a state, like California, applies the principle but gives it in each context its own name without reference to section 229, then the same law suddenly becomes a law that regulates insurance. Such an argument substitutes rubric for reason.

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[1] The Solicitor General suggests that UNUM "belatedly" raised in its reply brief at the *certiorari* stage the issue whether the notice-prejudice rule was "nothing more than a basic rule of contract law." (U.S. Br. at 11). The argument that the notice-prejudice rule is "not specifically directed at the insurance industry," *Pilot Life*, 481 U.S. at 50, is an argument that is directly in support of Petitioner's position on the first and second questions presented, and is in any event akin to the third McCarran-Ferguson criterion. *See* U.S. Br. at 13 ("as discussed above"). In its petition in this case, UNUM discussed the notice-prejudice issue at pages 5-7, 9-11, and 14-18.

Ward also notes that UNUM did not raise the issue of the notice-prejudice rule at all in its brief as appellee before the Ninth Circuit in this case. (Ward Br. at 14). This is true. Ward's complaint was barren of any suggestion of his intent to rely on the notice-prejudice rule (Pet. at 77a-80a). As evidenced by the District Court's order he did not raise the issue at all below (Pet. at 27a-33a). UNUM below naturally did not address the rule in this case, as opposed to *Cisneros v. UNUM Life Ins. Co. of America*, 134 F.3d 939 (9th Cir. 1998), until after it was raised *sua sponte* by the Ninth Circuit.

If the "label is everything" argument were accepted, even the *Elfstrom* rule would be a law regulating insurance because it is similarly impossible to find a single instance in which the *"Elfstrom"* rule is applied "as such" outside the insurance industry. Yet both Ward and the Solicitor General admit that the Ninth Circuit's agency law ruling in this case is nothing but the application of general agency principles applied in the context of group insurance. (Ward Br. at 35-36; U.S. Br. at 27-28, n.16). Applying general agency principles to insurance and calling them "the *Elfstrom* rule" no more creates regulation "specifically directed at the insurance industry" than calling Restatement section 229 principles "the notice-prejudice rule."

Respondent and his supporting *amici* would also have the inquiry turn on the chronological happenstance of each state's development and application of common law principles. If California, for example, had first adopted the notice-prejudice rule "as such" in a landlord/tenant case, then it would presumably follow that its subsequent adoption in an insurance case would not be a law regulating insurance. And what if California, tomorrow, were to apply the notice-prejudice rule in one or several other, non-insurance contexts? Would the law that is today said to be a law regulating insurance suddenly, *nunc pro tunc*, cease to be a law regulating insurance?

The point—which Respondent and his supporting *amici* ignore—is that, from a common-sense viewpoint, the common law in both its development and its application is not readily amenable to being regarded as a regulatory law. Courts generally do not think of themselves as "regulating" an industry (with the possible exception of the legal industry). Rules may evolve in cases arising in the context of particular industries because courts are limited to adjudicating specific controversies that come before them on a case-by-case basis. Thus, for example, even though the rule of strict liability for ultrahazardous activity was first developed (by another name) in a case involving the storage of waters upon land, *Rylands v. Fletcher*, House of Lords, 1868 L.R.3d H.L. 330, one would hardly describe the rule as a "land or water regulatory law." Rather, it was the adoption in a particular context of a principle that under various different names has been since applied in other contexts.[2]

B. To A Significant And Dispositive Extent, Respondent Fails To Demonstrate That The McCarran-Ferguson Criteria Are Satisfied.

Where, as here, the state law in question falls short of satisfying a common-sense definition of a law that regulates insurance, the Court should either end the inquiry, or at least require an especially strong satisfaction of the three McCarran-Ferguson criteria in order to find the law to be a law that regulates insurance. To the contrary, Respondent and his supporting *amicus* are forced to ask the Court to adopt what is fairly described as strained or diluted constructions of those criteria. In this respect, this case aptly demonstrates why all three McCarran-Ferguson criteria should be met before declaring that a law regulates insurance. The three criteria are interrelated to such an extent that a failure to satisfy any one serves as a warning that none is likely to be satisfied in a meaningful sense that is relevant to the inquiry at hand.

Regarding risk spreading, Respondent and the Solicitor General concede that the Ninth Circuit's conclusion—that the rule accomplishes no relevant risk transfer—is "not without support in the decisions of the lower federal courts." (Ward Br. at 24). Nevertheless, Respondent urges that the notice-prejudice rule effects risk spreading

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[2] The Solicitor General's observation that a common law rule fits ERISA's definition of a "state law," 29 U.S.C. § 1144(c)(1) (U.S. Br. at 12, n.5) does not mean that common law rules, as compared to statutes and regulations, are as easily determined to be state laws "which regulate[] insurance." 29 U.S.C. § 1144 (b)(2)(A).

"to ensure the policy will be performed to the insured's benefit in circumstances where, in the absence of the rule . . . there would be no performance, and hence no risk-spreading." *Id.* at 25. In other words, it can be outcome determinative. Yet, virtually any rule or procedure employed in adjudicating a dispute over a claim for benefits under an insurance policy can be outcome determinative. Evidentiary rules, a right to jury trial, the unconscionability doctrine, and so on, all satisfy this diluted notion of risk spreading.

Risk spreading, instead, is the process whereby the insurer contracts to reimburse the insured for a particular hazard or loss of which he or she is at risk. "As we appreciate the term 'spreading of risk' in the context of an insurance policy, the risk focused upon is that risk for which the insurance company has specifically contracted to reimburse the insured." *Tingle v. Pacific Mut. Ins. Co.*, 996 F.2d 105, 108 n.13 (5th Cir. 1993) (state statute shifting burden of innocent misrepresentations in policy applications to the insurer does not act to spread risk).[3] The requirement of a timely, post-loss claim is not an insurable risk to be transferred in this important sense. Rather, like satisfying a statute of limitations, or submitting a signed claim form, it is simply a condition to administering and enforcing whatever transfer has been agreed upon. Therefore, unless that which this Court has correctly deemed to be "an indispensable characteristic of insurance," *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979), is now to be

[3] *United States Dept. of Treasury v. Fabe*, 508 U.S. 491, 503-504 (1993), is not to the contrary. The majority opinion (described by the dissent as a "compromise," 508 U.S. at 517) simply held that a state insurance statute prioritizing payment of the agreed-upon reimbursement satisfies McCarran-Ferguson. A broad reading of the opinion to suggest that any state common law affecting whether an individual's claim is paid equates to risk spreading is unwarranted by the facts of the case, and would eliminate any distinction between risk spreading and dispute resolution.

deemed dispensable, the Ninth Circuit's holding should be reversed.

Regarding the second factor [Is the practice integral to the insurance policy relationship between the insurer and the insured?], administering claims and determining whether conditions for payment are met are processes that are regularly performed by non-insurers. While such activity relates to and arises out of the policy relationship, it can hardly be said to be integral to that relationship (unless everything that relates to it is "integral"). As the California Court of Appeal itself has recognized, the "bold assertion" that " '[c]laims adjustment is part of the insurance industry and is limited to it by definition' " is "inaccurate since case law demonstrates that many third party administrators of employee benefit plans are not insurance companies." *Bruenn v. Aetna Life Ins. Co.*, 197 Cal.App.3d 1000, 1005 (1987). Claims administration activity often is the province of employers, trustee committees or peer review organizations. *See Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982); *Powell v. Chesapeake & Potomac Telephone Co.*, 780 F.2d 419, 423-424 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986).

Finally, the defects in Respondent's arguments concerning the third criterion [Is the practice limited to entities within the insurance industry?] are fairly summarized in the foregoing paragraph of this Reply, and in part I.A, *supra*. Unless all of the McCarran-Ferguson factors are stretched beyond the point at which they lose meaningful application, the notice-prejudice rule fails to satisfy, certainly collectively, the relevant criteria for being classified as a law that regulates insurance.

II. EVEN IF CALIFORNIA'S NOTICE-PREJUDICE RULE WERE A LAW THAT REGULATES INSURANCE, IT COULD NOT MANDATE THE RULE OF DECISION IN A SECTION 502(a) ACTION FOR BENEFITS DUE UNDER THE TERMS OF THE PLAN.

A. Notwithstanding The Saving Clause, ERISA Preempts All Conflicting State Insurance Regulation.

The Solicitor General, whose predecessor successfully urged the Court in *Pilot Life* to sustain the fully federal character of ERISA civil enforcement actions, now shrinks from the logic and force of this Court's unanimous pronouncement. He relegates to a footnote his recognition of the fact that, notwithstanding the saving clause, state laws that regulate insurance (and are thus within the literal language of the savings clause read out of context) are nevertheless preempted if they stand as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (U.S. Br. at 24, n.13). In the substance and logic of his argument, the Solicitor General then renders his footnoted recognition of conflict preemption meaningless. He contends that conflicts between the provisions of ERISA and state laws regulating insurance are to be resolved by construing ERISA section 502 (and presumably all provisions of ERISA) so as to eliminate the conflict. In the words of the Solicitor General: "Accordingly, the saving clause by its terms directs that nothing in section 502, which concerns causes of action and remedies under ERISA, shall be 'construed' to relieve or exempt any person from 'any law' of a state that regulates insurance." *Id.* at 23.

This approach to applying the saving clause turns the proper analysis on its head. An understanding of ERISA's comprehensive, federal civil enforcement provisions is not informed by the saving clause. Exactly the opposite is true. As this Court has stated, "our understanding of the saving clause must be informed by the legislative intent

concerning the civil enforcement provisions provided by ERISA, section 502(a)." *Pilot Life*, 481 U.S. at 51-52. *See also John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86 (1993). In *John Hancock*, this Court held that ERISA itself regulates insurance, that the saving clause was only intended to save "complementary or dual regulation of insurance" by states, and that "in the case of a direct conflict, federal supremacy principles require that state law yield." 510 U.S. at 100 (*quoting* U.S. Br. at 23, n.13). In short, it is the saving clause itself that is to be construed so that it is in harmony with the provisions of ERISA, rather than those provisions being constrained to be in harmony with the saving clause. State insurance law that satisfies the literal language of the saving clause, yet conflicts with a provision of ERISA, is therefore preempted.

B. California's Notice-Prejudice Rule Intrudes In An Area Of Field Preemption And Also Directly Conflicts With At Least Two Central Aspects Of ERISA.

1. *Mandating the application of a state law rule of decision in a suit involving benefit rights brought under section 502(a) clashes with the preemptive force of that section as shown by Congress's intent that federal law control the administration and enforcement of benefit rights and obligations under ERISA plans.*

Respondent purports to bring a claim "to recover benefits due to him under the terms of his plan." 29 U.S.C. § 1132(a)(1)(B). Respondent and his supporting *amici* argue that, in determining what benefits are due to him under the terms of his plan, a federal court must apply what the Solicitor General calls a "rule of decision" developed by California courts under California common law. (U.S. Br. at 18 & 19). To accept this notion—that California law should mandate the "rule of decision" in a federal cause of action involving benefit claims

brought under the civil enforcement scheme of ERISA—is to thwart ERISA's purpose of governing such suits exclusively under federal law in a manner similar to that employed in section 301 of LMRA. It is also to reject the unanimous holding of this Court in *Pilot Life* that Congress intended "that all suits brought by beneficiaries or participants asserting improper processing of claims under ERISA-regulated plans be treated as federal questions . . . ." 481 U.S. at 56.

> The uniformity of decision which the act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to state laws.

Id. (*quoting* H.R. Rep. No. 95-533, p. 12 (1973), *reprinted in 2 Senate Committee on Labor and Public Welfare, Legislative History of ERISA*, 94 Cong., 2d session, 2359 (Comm. Print 1976)).

Betraying his acquired dislike for Congress's chosen federal scheme of claims administration and enforcement, the Solicitor General states that ERISA "contains some provisions regarding claims processing." (U.S. Br. at 9). This begrudgingly cramped description of the statute hardly captures the significance and comprehensiveness of what Congress has done. As this Court has noted, the detailed provisions of section 502(a) "set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Pilot Life*, 481 U.S. at 54. Congress intended that section 502(a) suits to enforce benefit rights or to recover benefits "will be regarded as arising under the laws of the United States, in similar fashion to those brought under section 302 of the Labor-Management Relations Act." 120 Cong. Rec. 29933 (1974) (remarks of Sen. Williams).

Congress did not intend that federal courts adopt a patchwork of state law rules of decision to be brought to bear in construing and enforcing (or, as here, not enforcing) rights of beneficiaries and obligations of fiduciaries under ERISA benefit plans. Precisely to the contrary, Congress "intended that a body of *Federal* substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." *Pilot Life*, 481 U.S. at 56 (*quoting* remarks of Sen. Javits) (emphasis supplied). This is an area of field preemption. State law is "*not* . . . an independent source of private rights in this area." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957) (section 301 case). Mandating application of the California rule of decision in this section 502(a) action for benefits due under the terms of the plan directly conflicts with that intent, and should therefore be rejected.

2. *The California rule of decision directly conflicts with ERISA's mandate that benefits be paid in accord with the written plan instrument.*

In section 402(a)(1) of ERISA, Congress stated: "Every employee benefit plan shall be established and maintained pursuant to a written plan instrument." 29 U.S.C. § 1102(a)(1). Congress's mandate that employee benefit plans be established and maintained pursuant to a written plan instrument is one of ERISA's "core functional requirements." *Curtis-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 84 (1995). Congress's written plan instrument mandate ensures that plan beneficiaries and participants can verify and determine for themselves precisely what their rights, duties and obligations are under these plans that are important to their welfare and security. Congress mandated that the plan administrator "shall make copies of the . . . instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants . . . ." 29 U.S.C. § 1024(b)(2). Congress mandated that summaries of

the plan be furnished to beneficiaries, 29 U.S.C. § 1024 (b)(1) & (2), and such summaries must describe the conditions of forfeiture. 29 C.F.R. 2520.102-3.[4] Congress also required that the plan administrator supply, upon written request by any participant or benficiary, a copy of, among other things, the "instruments under which the plan is established or operated." Any plan administrator that fails to comply with the request from a plan participant for a copy of the written plan instrument is subject to a civil enforcement penalty under 29 U.S.C. § 1132(c).

Having settled on the device of a mandatory and complete writing, Congress further specified the role that the written plan instrument must play. Most importantly for purposes of this case, Congress plainly and unambiguously requires that any plan fiduciary, like UNUM, "shall discharge his duties . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III." 29 U.S.C. § 1104 (a)(1)(D).[5]

Respondent and his supporting *amici*, however, would require UNUM, as the plan fiduciary, to pay benefits to

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[4] It is undisputed that such a summary, describing the notice of claim provision, was given to Ward. Pet. App. at 2a & 41a-43a.

[5] The federal courts have consistently barred participants' efforts to use state common-law waiver and estoppel doctrines to obtain benefits that are not "due" under the plan's written terms. *See Cinelli v. Security Pacific Corp.*, 61 F.3d 1437, 1444 (9th Cir. 1995) ("Consistent with the ERISA's strong preference for the written plan, we do not allow an estoppel claim to lie where it would contradict the written terms of the plan"); *Thomason v. Aetna Life Insurance Co.*, 9 F.3d 645, 648-649 (7th Cir. 1993) (claim for waiver not permitted to proceed where it contradicts the plan language). Conversely, at least some lower courts have seemingly "read into" plans state-mandated benefit coverage without attempting to reconcile such with the written plan instrument rule. *See Donatelli v. Home Ins. Co.*, 992 F.2d 763, 764 (8th Cir. 1993) (mandated "insanity" suicide coverage).

Mr. Ward even if they are not due to him under the written plan instrument if his failure to qualify under the terms of the written plan instrument causes no prejudice to UNUM. The California rule of decision—pay benefits even if not called for under the written plan instrument if there is no prejudice—thus directly conflicts with UNUM's principal obligation under federal law—to discharge its duties in accordance with the written plan instrument.

The Solicitor General sidesteps the direct conflict between ERISA's statutory rule of decision that fiduciaries follow the written terms of the plan and the California rule of decision that the fiduciary here might be required to pay benefits not in accordance with the terms of the written plan document. He simply suggests that the written plan document requirements of ERISA "could not reasonably be read to require fiduciaries to follow a plan's terms in contravention of applicable federal or state law." (U.S. Br. at 19, n.9). Of course there is no issue in this case of any conflict between the plan's terms and any applicable federal law. It is undisputed that both the plan and UNUM's conduct have been in keeping in all respects with the requirements of all applicable federal law. Federal regulations allow plans to set deadlines for filing claims so long as the time period is "reasonable" and satisfies a detailed list of notice and content requirements. 29 C.F.R. § 2560.503.1(b)-(d). No one asserts that the deadlines here do not comply with those federal requirements. The question is whether the fiduciary and the Court must follow a federal rule of decision or a state rule of decision. Nor is there any question of UNUM's not complying with a state law when it wrote and issued its policy. There is no suggestion that any insurance regulator has disapproved the terms of the policy. *See* Cal. Ins. Code §§ 10290, *et seq.* (prohibiting the sale of policies without commissioner approval). Nor is this a case, such as *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), in which an insurer seeks to omit from a policy a mandated benefit regarding which Congress has not opted for a uniformly federal scheme. Were it such

a case, the California insurance regulators—as did the Massachusetts regulators in *Metropolitan*—could presumably bring a state action to enjoin use of the non-complying form.

Respondent and his supporting *amici* alternatively advance a fiction: The California notice-prejudice rule of decision should be "incorporated into" the terms of the plan, or has "changed" those terms. (U.S. Br. at 18; Ward Br. at 31). Adoption of such a fiction for a rule of decision like notice-prejudice is, at base, rejection of the written plan instrument rule in a context in which ERISA itself directly regulates the applicable standards. Neither beneficiaries nor fiduciaries will be able to determine the procedures for making claims without researching state decisional law. Such laws might not always be "pro-insured." For example, some states, including California, preclude beneficiaries from recovering benefits due if the illness or injury is intentionally self-inflicted. Cal. Ins. Code § 533 ("An insurer is not liable for a loss caused by the willful act of the insured.").

The conflict between California's notice-prejudice rule and ERISA's "follow the written plan instrument" rule is especially pronounced because ERISA plans are usually plans that insure many employees. Premiums under group plans sold to employers may be experience-rated, and are often paid for (as here) by employer withholding from employee compensation. Some insurance plans, such as group annuity contracts funding retirement plans, may have benefit levels that are not fully guaranteed. *See, e.g., John Hancock, supra.* For these reasons, uncalled for payments to a plan beneficiary under an ERISA plan may affect *other* beneficiaries. All beneficiaries and participants who are so harmed are therefore entitled to bring actions to "enforce . . . the terms of the plan." 29 U.S.C. § 1132 (a)(3)(B)(ii). The California rule of decision, by contrast, generally presumes a two-party relationship. It thus gauges only "prejudice to the insurer," and by definition presumes that a payment not called for by the written plan causes no material harm. In short, it does not fit

into the regime of employee welfare benefit plans prescribed by Congress.

III. *PILOT LIFE* SHOULD NOT BE "NARROWED" OR OVERRULED.

The AARP asks the Court to overrule *Pilot Life*, and the Solicitor General suggests that *Pilot Life* might be revisited and narrowed. This Court may easily dispose of the AARP's argument. The AARP's justification for overturning this longstanding, unanimous decision, is that it supposedly interferes with recent state consumer protection statutes. The AARP nevertheless appears unable to present a single example of this alleged interference. (AARP Br. at 9). None of the state laws cited by AARP is impacted by *Pilot Life*'s holding that ERISA provides the exclusive civil enforcement mechanism for benefit claims.

The Solicitor General suggests that Congress did not intend that section 301 of the LMRA should serve as the model for ERISA suits in which the claim for plan benefits is based on "a state-law cause of action or remedy that 'regulates insurance'." (U.S. Br. at 25). The suggestion is without support in the legislative history or the text of ERISA or McCarran-Ferguson. Additionally, the Solicitor General does not demonstrate that a "state-law cause of action or remedy" that would not regulate the "business of insurance" under the McCarran-Ferguson Act nonetheless is "saved" by ERISA. He also overlooks the fact that the Court *resolved* the potential tension between the preemption and saving clauses of ERISA by explaining in *Pilot Life* that Congress had an overriding intent that suits over benefit disputes should "arise under" and be governed by preemptive federal law in the same manner as suits under section 301. 481 U.S. at 52.

Other than this, the Solicitor General justifies his change of position on "significant experience with ERISA preemption in the intervening 12 years." (U.S. Br. at 25-26, n.14). He does not say *what* events occurred to cause

this extraordinary change in position from the Solicitor General's May 1986 *amicus* brief. Congress's intent that ERISA suits for plan benefits be regarded as "arising under" preemptive federal law in the same manner as suits under section 301 of the LMRA has not changed, nor has Congress amended the ERISA preemption or saving clauses or the civil enforcement provisions in a manner impacting benefit suits. Moreover, any "general" presumption that Congress did not intend federal law to displace state law must immediately disappear when the Court is confronted by a participant's suit to obtain plan benefits. As demonstrated by the House Conference Report and confirmed by *Pilot Life*, it was Congress's clear and manifest purpose to govern such suits pursuant to an exclusive civil enforcement scheme patterned on preemptive federal law under section 301 of the LMRA. The decision in *Pilot Life* and the Court's subsequent reaffirmation in *John Hancock* that ERISA preempts conflicting state insurance regulation will remain correct unless and until Congress rewrites the statute, a purely legislative task.

IV. NEITHER WARD NOR THE SOLICITOR GENERAL MAKES A COLORABLE ARGUMENT FOR APPLICATION OF STATE AGENCY LAW IN THIS CASE.

Both Ward and the Solicitor General concede, for different reasons, that the Ninth Circuit erred in holding that "ERISA does not operate to preempt the application of the state law embodied in *Elfstrom v. New York Life Ins. Co.*, 67 Cal.2d 503 (1967) and its progeny" (Pet. App. at 24a). Both Ward and the Solicitor General nevertheless present theories for applying the rule regardless of the Ninth Circuit's admitted error. The Solicitor General's suggestion is that the case be remanded for a determination whether "the *Elfstrom* rule, or something like it," should be incorporated into federal common law. (U.S. Br. at 28). Ward, instead, argues that the Ninth Circuit never actually applied the *Elfstrom* rule, but rather a "formulation" of *Elfstrom* that is not preempted.

A federal court creates federal common law to govern ERISA cases where ERISA itself is silent. *Butler v.*

Encyclopedia Britannica, Inc., 41 F.3d 285, 294 (7th Cir. 1994) ("courts may develop . . . a federal common law only where ERISA itself does not expressly address the issue before the court").

Conversely, the federal courts may not by application of federal common law adopt alternative resolutions of issues on which the statute is not silent. *Flacche v. Sun Life Assurance Co.*, 958 F.2d 730, 735 (6th Cir. 1992) (directive to create common law "does not imply that courts are to develop common law alternative definitions for terms that are clearly defined by statute"). ERISA itself specifies the procedures for identifying the respective roles and responsibilities of the employer, the "named fiduciary," and the plan administrator. (Pet. Br. at 42-44). (*See also* Proposed 29 C.F.R. § 2560.503-1(t)(iii)). "The plan can only act through its trustees, administrators, or others *to whom specific responsibilities have been assigned* by those trustees and administrators." 63 Fed. Reg. 48389, 48392 (Sept. 9, 1998) (emphasis supplied). Accordingly, there is simply no reason to remand, as the Solicitor General suggests, in order for the Ninth Circuit to consider whether to do what it plainly cannot do. *See also Bell v. Wolfish*, 441 U.S. 520, 532 n.13 (1979).

Ward's argument to escape the undeniable fact that the *Elfstrom* rule "relates to" ERISA plans is that the Ninth Circuit supposedly did not apply *Elfstrom*, but rather a general agency law "formulation" of *Elfstrom* based on the Oregon case of *Paulson v. Western Life Ins. Co.*, 636 P. 2nd 935 (Or. 1981). (Ward Br. at 35). Ward's support for this position is that instead of deeming the employer to be UNUM's agent, as he insists *Elfstrom* required, the Ninth Circuit remanded the case for factual development on the agency issue. This argument essentially misreads the Ninth Circuit holding that "ERISA does not operate to preempt the application of the state law embodied in *Elfstrom* and its progeny," which therefore should be "[*a*]*pplied* in the context of this case" (Pet. App. at 24a) (emphasis added). The remand was neces-

sary because *Elfstrom* did not hold that the employer was always the agent of the group insurer (*see Elfstrom*, 67 Cal. 2d at 509-510). In any event, as shown in the Brief for Petitioner at pages 42-45, and in the Brief of the United States at pages 26-28, ERISA would preempt all state agency law rules defining or governing fiduciary conduct, whatever the nomenclature given to the rules, because they directly clash with and supersede ERISA's extensive system of rules governing fiduciary and co-fiduciary duties and liabilities.

CONCLUSION

For the reasons stated in the Brief for Petitioner, as well as this Reply, the decision of the Ninth Circuit Court of Appeals should be reversed and the case remanded with instructions to affirm the summary judgment in favor of the Plan and UNUM.

Respectfully submitted,

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